

JUN 24 1998

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of Secretary

In the Matter of )

Southwestern Bell Telephone Company, )  
Pacific Bell, and Nevada Bell Petition for )  
Relief from Regulation Pursuant to Section )  
706 of the Telecommunications Act of 1996 )  
and 47 U.S.C. § 160 for ADSL Infrastructure )  
And Service )

CC Docket No. 98-91

TO: The Commission

**OPPOSITION OF COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby opposes the "Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell for Relief from Regulation" ["SBC Petition"] filed on June 9, 1998 in the above-captioned proceeding. In that petition, SBC requests permission to provide asymmetrical digital subscriber line ("ADSL") functionality as an unbundled network element or on a resale basis according to terms, conditions and rates that it sets. SBC does not want to be required to provide ADSL functionality to all requesting telecommunications carriers on a non-discriminatory basis pursuant to 47 U.S.C. §§ 251(c)(3)-(4), particularly not at the cost-based prices mandated by the Telecommunications Act of 1996. SBC also asks to be regulated as a non-dominant carrier for providing ADSL services, and to be relieved of the "most favored nation" requirement in 47 U.S.C. §252(i).<sup>1</sup>

<sup>1</sup> SBC does not plan to use a separate affiliate to provide deregulated ADSL services, but instead proposes accounting safeguards. SBC Petition at 35. CompTel will not address that proposal except to note that accounting safeguards are plainly inadequate to prevent cross-subsidies, discrimination, and other anti-competitive practices.

The FCC should reject the SBC Petition because it does not have the statutory authority to forbear from applying Section 251 requirements, and SBC in any event has wholly failed to satisfy the statutory criteria for forbearance. The compelling public interest in making advanced telecommunications capabilities widely available at affordable rates within the U.S., as embodied in Section 706 of the 1996 Act, militates in favor of full compliance with all statutory requirements, as well as continued dominant carrier regulation for incumbent local exchange carriers ("ILECs") who provide ADSL services. As a result, merely rejecting the SBC Petition is not sufficient. SBC is not complying with Section 251 requirements even as it seeks relief from them. When ILECs take the law into their own hands in this manner, the FCC should explore all available enforcement and regulatory options to ensure full compliance with all statutory requirements immediately, including the provision of local loops with ADSL functionality pursuant to Sections 251(c)(3)-(4).

1. **THE FCC DOES NOT HAVE AUTHORITY TO FORBEAR FROM APPLYING SECTION 251(C)**

Congress adopted Section 10 of the Communications Act to give the FCC explicit forbearance authority for the first time, but Congress expressly withheld that authority for Section 251(c) until after the FCC determines that Section 251(c) has been "fully implemented." 47 U.S.C. §160(d). The FCC has found many times, and SBC does not formally dispute here, that ILECs have not yet "fully implemented" Section 251(c). E.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, to Provide In-Region Services In Michigan, 12 FCC Rcd 20543 (1997). Hence, the FCC may not grant SBC's request to exempt ADSL services from Sections 251(c)(3)-(4).

SBC's contention that Section 706 authorizes the FCC to do what Section 10 expressly forbids is frivolous. That contention has been addressed at length by CompTel and other parties in response to the forbearance petitions filed by Ameritech, Bell Atlantic and U S West in related dockets. E.g., Opposition of the Competitive Telecommunications Association, CC Docket Nos. 98-11, 98-26 & 98-36, filed April 6, 1998, at 9-14 ["CompTel Opposition"]. CompTel will not repeat that discussion here, except to underscore the critical importance of rejecting those petitions promptly and taking the necessary actions to ensure full and immediate compliance with all Section 251 requirements to promote local competition and the public interest objectives of Section 706.

## **II. SBC HAS NOT SATISFIED THE STATUTORY CRITERIA FOR EXERCISING FORBEARANCE AUTHORITY**

Apart from the FCC's lack of forbearance authority for Section 251(c), SBC has failed to satisfy the statutory criteria for exercising such authority. Under Section 10, the FCC cannot forbear from applying a statutory requirement unless it determines that enforcing the requirement is not necessary to ensure reasonable and non-discriminatory rates and practices, to protect consumers, or to promote the public interest. 47 U.S.C. §§ 160(a)(1)-(3). The FCC also must determine whether forbearance would promote competitive market conditions. Id., §160(c). For ADSL functionality, full compliance with applicable statutory requirements remains essential to achieve each one of those objectives.

### *A. SBC's Dual Track Approach.*

SBC's plan is not hard to discern. SBC hopes to establish two separate and clearly unequal tracks for providing ADSL functionality to end users. For itself, SBC wants to take

advantage of its monopoly over local loops and related local exchange facilities to offer ADSL services broadly to business and residential users without offering ADSL functionality to any other carrier except according to the terms, conditions and rates SBC sets. For other carriers, SBC wants to force them to provide ADSL services by purchasing local loops as unbundled network elements (“UNEs”) from SBC and installing the Digital Subscriber Line Multiplexer (“DSLAM”) through collocation arrangements with SBC. By delaying and obstructing UNE deployment and collocation arrangements, SBC will hamstring competing ADSL services and give its own ADSL services an insuperable competitive advantage.

It does not take an active imagination to identify the ways in which SBC will impede its rivals’ ADSL offerings. As ILECs do today with UNEs, SBC can delay provisioning local loops to competing ADSL providers, thereby poisoning those providers’ relationship with their new customers while giving SBC another chance to sell its own ADSL services to those end users. In cases where SBC determines that loop modifications are required for a competing ADSL service, SBC could refuse to make the modifications, slow-roll the modifications, or charge excessive rates on the self-serving theory that such modifications are not governed by the statutory cost-based pricing standards.

Further, SBC stated that it will not provision local loops for ADSL services until it performs a facility check, a loop qualification check, and a spectrum management check to make sure the competing service “will not affect existing services.” SBC Petition at 18-19. SBC presumably will charge new entrants for those checks at rates which will not conform to the statutory cost-based pricing standards. Moreover, SBC concedes that the software for those tasks is either brand new (and hence untested for efficiency, transparency and reliability) or not yet developed. Id. at 18. Each of the three checks presents opportunities for abuse, and the

spectrum management check is particularly ominous because it recalls the days when the vertically-integrated Bell System undermined competition in the customer premises equipment (“CPE”) market through pretextual findings that new CPE harmed the network.

SBC also has many opportunities to restrict or eliminate the ability of competing carriers to establish the collocation arrangements necessary to provide ADSL services. ILECs routinely wait many months before implementing collocation and associated multiplexing capabilities. E.g., ALTS Petition for Declaratory Ruling, CC Docket No. 98-78, filed May 27, 1998, at 17 (6-10 month lead times are routine). For an increasing number of central offices, there is no available collocation space. In other central offices, the available collocation space cannot be used until the ILEC completes expensive and potentially delayed “conditioning.” E.g., Comments of AT&T Corp., CC Docket No. 98-11, filed April 6, 1998, at 18 & nn.34-35 (28% of requested Bell Atlantic central offices have no available space, and 33% required conditioning prior to collocation). The ILECs contribute to the scarcity of available central office space through unreasonable collocation restrictions, such as prohibitions against cage-less collocation, unnecessary size requirements for cages, and harmful restrictions against shared use and cross-connections. Even when collocation is available, the ILECs have made it so expensive as to preclude collocation for all but the highest density central offices.

In short, SBC’s proposal is designed to ensure that it can introduce ADSL services quickly and at minimum cost according to its own business plan, while using the UNE and collocation deployment process to explode competitors’ business plans and keep new entry on a leash where it is not precluded altogether. That result is bad for competition and consumers. In order to promote competition, maximize consumer choice, spur innovation, and reduce rates, the FCC must ensure that SBC and the other ILECs comply with their statutory obligation to offer

local loops with ADSL functionality both as an unbundled network element pursuant to Section 251(c)(3) and on a resale basis pursuant to Section 251(c)(4).

*B. The Economics of ADSL Competition.*

Even if the ILECs did not manipulate the UNE and collocation process to impede new entrants at every turn, SBC's approach would guarantee that the ILECs would face little to no ADSL competition for a large segment of potential customers. By virtue of their existing local exchange networks and the built-in ADSL demand within their existing customer base for monopoly local services, the ILECs can justify installing ADSL capability and providing ADSL services out of the large majority of their central offices.<sup>2</sup> By contrast, new entrants would have to invest many hundreds of thousands of dollars to build an entire ADSL business – e.g., establishing interoffice facilities; purchasing and installing DSLAMs; building a customer base; developing technical support, marketing and back office operations – virtually from scratch on a central office-by-central office basis. The enormous cost of building an ADSL business from the ground up would effectively limit ADSL competition to high-density urban areas. The only way for ADSL competition to develop on a widespread basis is for new entrants to begin offering service by purchasing ADSL loops as UNEs at cost-based rates, or by reselling the ILECs' ADSL services.

Further, the reasons why Congress adopted the UNE and local resale requirements in Section 251(c) apply squarely to ADSL functionality and services. Congress recognized that it would inhibit investment and competitive entry if competitors were forced to build duplicative

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<sup>2</sup> SBC evidently agrees with this assessment, based on its decision to install DSLAMs capable of serving 576 lines simultaneously. SBC Petition at 8.

local exchange networks to enter the market. Therefore, Congress authorized new entrants to share in the ILECs' significant economies of scale and scope (a residual and unearned monopoly benefit) by relying entirely upon UNEs, entirely upon resale, or upon any combination of the two. E.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15670-71 (1996) (limiting access to UNEs to entrants who have or build their own facilities would deter competitive entry contrary to statutory language and congressional intent). SBC would reinstate the approach Congress expressly rejected by forcing new entrants to spend enormous sums just to be in a position to provide ADSL service to a single customer. By requiring ILECs to provide local loops with ADSL functionality on a UNE and resale basis, the FCC would ensure the widest possible introduction of ADSL services by competing providers at affordable rates.

*C. Removing The ADSL Functionality.*

The FCC should deny the SBC Petition because it would enable ILECs to obtain a significant first-mover advantage by locking up customers while other entrants are still trying to fight through SBC's UNE and collocation process to enter the market. In cases where SBC obtains a new subscriber and installs ADSL loop functionality, SBC will make it difficult for that end user to migrate to another carrier by stripping the ADSL functionality before providing the loop to the new carrier as a UNE. See Texas PUC Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Market, Transcript at ¶¶780-82 (testimony by SBC witness indicating that SBC will strip ADSL before providing local loop as UNE). That conduct would impede competition in at least two ways. First, even though the new entrant did not ask for or want the ADSL functionality to be removed, SBC undoubtedly would charge the new

carrier (or the end user) for doing so, and SBC presumably would contend that such rates are not subject to the cost-based pricing standards in the statute. Second, SBC's removal of the ADSL capability would impose a service interruption on customers who wish to migrate to a new carrier. In sum, by making it costly and inconvenient to leave SBC for a new carrier, SBC could insulate a significant portion of its ADSL customer base from competition. The only way to prevent such an anti-competitive result is to insist that ILECs offer local loops with ADSL functionality on both a UNE and a resale basis as required by the statute.

*D. Service Limitations.*

SBC states that its petition would not apply to "purely circuit-switched voice service (e.g., telephone exchange service, telephone toll service)." SBC Petition at 5. In fact, there would be no way to prevent end users from routing local or long distance voice traffic over the permanent virtual channels ("PVCs") they would obtain from ADSL service. SBC itself concedes that once an ADSL customer establishes a PVC with a router, that customer could "essentially make[] long distance calls." SBC Petition at 9. Hence, the SBC Petition would give the ILECs a virtual *carte blanche* to avoid their Section 251 obligations simply by transferring customers and traffic to ADSL services. The FCC should not grant a forbearance petition based upon the untenable position that it is technically or administratively feasible to authorize a *technology* while seeking to limit or control the *services* it can be used to provide or the *traffic* it can carry.



*E. Investment Incentives.*

SBC and the other ILECs raise the straw man that removal of fundamental Section 251(c) requirements is necessary to provide them with an incentive to invest in advanced telecommunications capabilities. In fact, the ILECs already are investing billions of dollars in developing such capabilities, and the competitive industry is devoting enormous resources to doing the same. E.g., CompTel Opposition at 3-7. It is competition within the framework established by Congress – not the premature removal of that framework before it is even implemented – that will maximize the industry’s investment in such capabilities. Without that framework, new entrants will be limited to narrow market segments for ADSL and other advanced services, and their investments will be limited accordingly. The ILECs themselves will invest more resources more quickly in response to competitive entry than in a protected monopoly environment. The ultimate irony of the ILECs’ Section 706 petitions is that, if granted, they would defeat the ostensible objective for which they were filed – namely, to promote the widespread availability of advanced telecommunications capabilities to all Americans.

*F. Section 252(i)*

SBC asks for a waiver of the “most favored nation” requirement in Section 252(i) so that it can offer ADSL loops as UNEs, or ADSL services on a resale basis, without being required to offer them to other carriers on non-discriminatory terms. SBC Petition at 33. This request shows that SBC’s real goal is not merely to withhold offering ADSL functionality on a UNE or resale basis, but to ensure that it can make such offerings selectively according to terms,

conditions and rates that it sets, rather than on a non-discriminatory basis at cost-based rates as mandated by Congress. SBC's request for a license to discriminate plainly is not in the public interest.

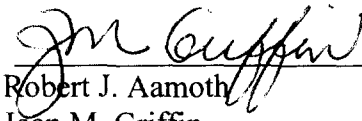
### **III. THE FCC SHOULD REGULATE ILECS AS DOMINANT CARRIERS IN THE PROVISION OF ADSL FUNCTIONALITY AND SERVICES**

The FCC should reject SBC's request to be reclassified as a non-dominant carrier because SBC has not shown that it lacks market power in the ADSL market segment. To the contrary, SBC and other ILECs occupy a unique market position due to their ubiquitous local exchange network and their monopoly control over the local loops necessary to provide ADSL capabilities broadly among end users. Further, by marketing ADSL services to its local customer base as part of a package containing other monopoly services, SBC will have both the incentive and ability to leverage its local exchange monopoly into the ADSL marketplace. Dominant carrier regulation is necessary to protect competition and consumers from the abuse of marketplace power by ILECs.

Respectfully submitted,

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June 24, 1998

## CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that on this 24th day of June, 1998, a copy of  
the **OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**  
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